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## Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession

### Cover Page Footnote

Professor of Law, Northwestern University School of Law. Thanks to the Julius Rosenthal Endowment Fund for research support in the summer of 1998 and to Daniel Goldwin for his assistance with research for this essay. \* Professor of Law, Brooklyn Law School. Thanks to the Brooklyn Law School Faculty Research Program and to Joan Erskine and Alexandra Derian for research assistance.

## ARTICLES

# FEMINIST LEGAL THEORY, FEMINIST LAWMAKING, AND THE LEGAL PROFESSION

Cynthia Grant Bowman\* and Elizabeth M. Schneider\*\*

### INTRODUCTION

THIS essay addresses the interrelationship among feminist legal theory, feminist lawmaking,<sup>1</sup> and the legal profession. We describe a complex interaction between theory and practice that has two main "arenas": (1) the interaction between feminist legal theory and the development of feminist lawmaking and substantive law, and (2) the impact of feminist legal theory upon the way law is practiced. We begin with a brief introduction to the variety of feminist legal theories and their relationship to substantive legal struggles in which feminist practitioners have been engaged. We then turn to a more detailed description of the impact of feminist legal theory on legal practice and the legal profession.

We argue that examination of theory and practice in both arenas reveals a spiral relationship in which feminist practice has generated feminist legal theory, theory has then reshaped practice, and practice has in turn reshaped theory.<sup>2</sup> Thus, whether the issue is feminist law reform or the gendered structure of the legal profession, feminist legal theory cannot be understood apart from practice. At the same time, the formulation of legal theory has played an integral role in the development of social change in all of these areas.

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\* Professor of Law, Northwestern University School of Law. Thanks to the Julius Rosenthal Endowment Fund for research support in the summer of 1998 and to Daniel Goldwin for his assistance with research for this essay.

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1. "Feminist lawmaking" is the process by which "[w]omen have shaped the law by imagining the law differently[. . .] developed theory from practice, turned that new theory into practice, and then brought it back to theory." Elizabeth M. Schneider, *Feminist Lawmaking and Historical Consciousness: Bringing the Past into the Future*, 2 Va. J. Soc. Pol'y & L. 1, 7 (1994) [hereinafter Schneider, *Feminist Lawmaking*] (footnote omitted); see also Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589, 604-10 (1986) [hereinafter Schneider, *Dialectic*] (detailing the dialectical approach to rights).

2. This relationship has been viewed as dialectical in the lawmaking context. See Schneider, *Dialectic*, *supra* note 1, at 604-05. Others have used the phrase "theory-practice spiral." See Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 Minn. L. Rev. 1599, 1617 (1991).

# I. THE INTERRELATIONSHIP BETWEEN FEMINIST LEGAL THEORY AND FEMINIST LAWMAKING

During the century preceding the 1960s, there had been substantial efforts to change the law respecting women's rights in the United States. The women's suffrage movement fought for inclusion of sex in the text of the Fourteenth Amendment; Myra Bradwell fought for the right to be admitted to the bar under the Privileges and Immunities Clause of the Fourteenth Amendment; many litigants and lawyers sensitive to issues of sex discrimination raised legal issues concerning women's equality; and a major and finally successful effort to pass the Nineteenth Amendment to the Constitution gave women the right to vote.<sup>3</sup> In the 1960s, a "second wave" of an active women's rights movement developed from the civil rights struggle, leading to renewed efforts both to change the law so as to abolish sex discrimination and to reshape the legal profession so as to integrate women within it.<sup>4</sup>

This effort, led by a new generation of women's rights attorneys, manifested the interrelationship of theory and practice. Ruth Bader Ginsburg (then a law professor and counsel to the ACLU Women's Rights Project), important scholars in the area of sex discrimination such as Herma Hill Kay at Boalt Hall and Barbara Babcock at Stanford (who taught one of the first Women and the Law courses at Yale Law School), and many others taught and influenced a younger generation of students who would become the leading lawyers handling sex-discrimination litigation. For example, the women's rights litigators who founded the San Francisco public interest firm Equal Rights Advocates in 1974 (Wendy Williams, Mary Dunlap, and Nancy Davis) had worked with Herma Hill Kay at Boalt Hall.<sup>5</sup> Ann Freedman and others who formed the Women's Law Center in Philadelphia had been students at Yale who worked with Barbara Babcock.<sup>6</sup>

The National Conference on Women and the Law, an annual meeting of practitioners, law students, and law teachers, also played a critical role in providing a national forum to discuss and generate cutting-edge work in the area of women's rights.<sup>7</sup> Radical ideas about topics

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3. For a brief description of these developments and citations to further reading, see Mary Becker et al., *Feminist Jurisprudence: Taking Women Seriously* 1-14 (1994).

4. See *id.* at 17-30 (citing sources).

5. See Cynthia Fuchs Epstein, *Women in Law* 137-39 (2d ed. 1993) (describing the founding of Equal Rights Advocates). For a recent discussion of the evolution of the work of Equal Rights Advocates, see Judy Scales-Trent, *Equal Rights Advocates: Addressing the Legal Issues of Women of Color*, 13 *Berkeley Women's L.J.* 34, 39-66 (1997).

6. See Barbara Allen Babcock et al., *Sex Discrimination and the Law: Causes and Remedies* at v (1975).

7. See *id.*; Patricia A. Cain, *The Future of Feminist Legal Theory*, 11 *Wis. Women's L.J.* 367, 371-81 (1997) (describing the importance of the conference to the development of feminist legal theory and her experience as a participant, panelist, and organizer); Schneider, *Feminist Lawmaking*, *supra* note 1, at 1-6.

such as sexual harassment, date rape, battered women, and self-defense were discussed for the first time in these fora by lawyers who were working on these issues nationwide. The litigation efforts that followed, which posed issues of equal protection in a host of areas such as Social Security,<sup>8</sup> pregnancy discrimination, and parental leave,<sup>9</sup> as well as activist efforts around the Equal Rights Amendment,<sup>10</sup> raised important arguments about the nature of gender which laid the foundation for feminist legal theory. Although the presence of women teachers in the law schools had a huge impact in mobilizing, energizing, and supporting a younger generation of women entering the legal profession to do this work, the theories of equality and the federal Equal Rights Amendment emerged primarily from the practical demands of activist efforts at lawmaking. For example, in 1971, Barbara Brown, Ann Freedman, Tom Emerson, and Gail Falk wrote an important article on Constitutional equality specifically to shape Congressional efforts to pass the Amendment.<sup>11</sup> Catharine MacKinnon's 1979 book, *Sexual Harassment of Working Women*, was written to present a legal theory that explained the harm of sexual harassment as it had already been litigated by many feminist lawyers and provide an effective remedy for these harms.<sup>12</sup>

Today, feminist legal theory has evolved into four major schools: formal equality theory, "cultural feminism," dominance theory, and post-modern or anti-essentialist theory.<sup>13</sup> Formal equality theory, grounded in liberal democratic thought, argues that women should be treated the same as men, while cultural feminists emphasize the need to take account of "differences" between men and women. Dominance theory sidesteps both of these approaches, focusing instead upon the embedded structures of power that make men's characteristics the norm from which "difference" is constructed. Anti-essentialism, by contrast, contends that there is no single category "female," pointing instead to the varying perspectives resulting, for example, from the intersection of gender, race and class. The last three ap-

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8. See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977) (construing section 215 of the Social Security Act); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (construing the Federal Old-Age, Survivors, and Disability Insurance program); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (same).

9. See *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (construing the Pregnancy Discrimination Act of 1978); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (construing section 2626 of the California Unemployment Insurance Code).

10. Becker et al., *supra* note 3, at 22-24; Jane J. Mansbridge, *Why We Lost the ERA* (1986).

11. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971) (outlining the development, structure, and anticipated operation of the proposed Equal Rights Amendment).

12. Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979).

13. For discussion of each of these four branches of feminist legal theory, see Becker et al., *supra* note 3, at 68-98, 110-35.

proaches are all "theoretical" critiques of formal equality which emerged from the contradictions and political struggles that developed in the course of efforts to implement formal equality in practice and addressed the limits of formal equality in redressing sex discrimination.

The emergence of cultural feminism or "difference" perspectives in the law were largely shaped by efforts to understand the uniquely female experiences of pregnancy and motherhood. For example, the historical failure of the Supreme Court's equality jurisprudence to address issues of pregnancy as implicating issues of gender equality<sup>14</sup> had an enormous impact on women's lives and the law. In response, the Pregnancy Discrimination Act of 1978 defined pregnancy discrimination as sex discrimination under Title VII<sup>15</sup> and generated renewed attention to the notion of "difference" in a variety of contexts.

In contrast, dominance theory presented an important theoretical framework within which to understand the harms of violence against women in areas such as domestic violence, rape, sexual harassment, and pornography. Formal equality (or at least a "gender complementarity" theory of formal equality) was not adequate to analyze these harms, experienced almost exclusively by women, because it failed to address the patriarchal structures of power that led to and perpetuated them. Thus, dominance theory emerged from efforts to grapple with the reality and experience of male dominance and privilege in these areas.

Finally, anti-essentialist or post-modern feminism developed from challenges to a notion of a single feminist legal theory and perspective and articulated the need to account for the wide range of feminist perspectives that emerged from women of color, issues of ethnicity, problems of immigrant women, and cultural differences.<sup>16</sup> For example, Kimberlé Crenshaw criticizes feminist legal theory's failure to reflect African American women's experience of rape,<sup>17</sup> while Paulette

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14. See *Geduldig*, 417 U.S. at 497 n.20 (stating that discrimination based upon pregnancy is not sex discrimination under the Equal Protection Clause, because it classifies between non-pregnant persons, who can be male or female, and pregnant persons).

15. 42 U.S.C. § 2000e(k) (1994).

16. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140 [hereinafter Crenshaw, *Demarginalizing the Intersection*] (arguing that many of the experiences that black women face are not subsumed within the traditional boundaries of race or gender discrimination); Kimberlé Crenshaw, *Mapping the Margins: Identity Politics, Intersectionality and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1242-44 (1991) (describing the intersectional location of women of color and their marginalization within dominant resistance discourses); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 585 (1990) (discussing the need for multiple consciousness in the feminist movement).

17. See Crenshaw, *Demarginalizing the Intersection*, *supra* note 16, at 157-60.

Caldwell explains how employment discrimination law fails to capture discrimination that is motivated by both sex and race.<sup>18</sup> This approach has emphasized the importance of storytelling, both as a way to bring diverse experiences into the law and as a way to broaden the legal descriptions of experience that are translated into law.<sup>19</sup> This theoretical perspective challenges us to address the intersections of race, gender, ethnicity, class, sexual orientation, age, and disability, as well as to explore what commonality might mean in coalition efforts. It also challenges us to move beyond the telling of stories to more substantive change.

There are many examples of how the spiral from practice to theory and back to practice has operated. For example, feminist practice efforts to argue pregnancy as an issue of gender equality led to both practical law reform strategies such as the Pregnancy Discrimination Act and feminist legal scholarship on these issues. A variety of perspectives were developed by Sylvia Law,<sup>20</sup> Herma Hill Kay,<sup>21</sup> Wendy Williams,<sup>22</sup> and Lucinda Finley,<sup>23</sup> among others, and were reflected in public disagreement and debate in the "Cal Fed" case, in which feminist groups filed opposing briefs about whether pregnancy disability should be given "special" treatment not afforded to other temporary disabilities.<sup>24</sup>

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18. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 Duke L.J. 365, 371-72.

19. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2412-13 (1989) (describing how outsiders' stories build cohesion within the excluded group and subvert the dominant ideology); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073, 2083-84 (1989) (describing the broadening of legal discourse to include the stories of "outsiders" such as women and people of color).

20. See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1008-10 (1984) (arguing for heightened scrutiny of laws governing reproductive biology, including an inquiry into whether the law has a significant impact in perpetuating the oppression of women).

21. See Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 Berkeley Women's L.J. 1, 37-38 (1985) (arguing that the proper comparison to determine sex discrimination is between employees who exercise their reproductive rights and become pregnant—a group comprised entirely of women—and male employees, who exercise their reproductive rights but do not become pregnant).

22. See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 330 (1984-1985) (arguing that the burden of justification should be placed upon the party defending a law or rule that has a disproportionate negative impact on one sex).

23. See Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1165-67 (1986) (arguing for an integration of the public sphere of work and the private sphere of family, and a re-ordering of the gender hierarchy that currently values the "masculine" public sphere at the expense of the "feminine" private sphere).

24. In *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), feminist legal scholars filed amicus briefs on both sides. NOW, the NOW Legal Defense and Education Fund, the National Women's Law Center and others, represented by Wendy Williams, argued that the California statute requiring employers to provide leave for childbirth constituted sex discrimination and should be upheld only

In short, feminist legal theory has highlighted the issue of gender in law, and the range of feminist legal theories that have developed continue to deepen our understanding of the complex interrelationship between gender and law. But it is important to appreciate the critical way in which feminist legal theory emerged from practice, and the way in which new theoretical insights formulated by litigators and academics continue to reshape practice. Indeed, feminist legal theory, understood generically, has been the intellectual means for argument and debate about issues of equality that first emerged in law reform practice and continue to resonate both in practice and in the world at large.

This interrelationship is inevitable because the worlds of theory and practice in this area of the law are inextricably linked. An unusual number of feminist legal theorists and academics have a background in practice, particularly on issues of gender.<sup>25</sup> Many continue to work as scholar-activists and cultural commentators on a range of issues affecting gender and law—as lawyers arguing cases, drafting legislation, writing amicus briefs, serving as reporters to state and federal task forces, or commenting to the media—or have moved among these roles at different periods of their professional lives.<sup>26</sup>

Theory and practice are also inextricably linked in this area because of the close proximity between issues of life and law. Anita Hill's challenge to Clarence Thomas's Supreme Court appointment, for example, highlighted more than a decade of litigation and scholarship on sexual harassment and resulted, in turn, in the further refinement of feminist theory.<sup>27</sup> The O.J. Simpson case brought similar work on do-

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if employers were required to provide disability leave to all employees. Other feminist law professors and other groups, represented by Christine Littleton and Judith Resnik, filed a brief arguing that the law should be upheld because it remedied a form of sex discrimination not addressed by federal law, the discriminatory impact of inadequate leave policies on women's right of procreative choice. The Supreme Court upheld the California legislation, holding that it had not been preempted by the Pregnancy Discrimination Act. For excerpts from the two amicus briefs, see Becker et al., *supra* note 3, at 65-67.

25. Wendy Williams, Catharine MacKinnon, Carrie Menkel-Meadow, and Lucie White are only some of the many feminist legal scholars whose work is grounded in feminist legal practice experience.

26. For example, law professors such as Rhonda Copelon, Sylvia Law, Christine Littleton, Judith Resnik, Deborah Rhode, Susan Deller Ross, Nadine Taub, Wendy Williams, and both authors of this article are among many who have participated in these different ways.

27. The Southern California Law Review, for example, held a symposium on the Hill-Thomas hearings, which produced, among other wonderful pieces of scholarship, Martha R. Mahoney's article, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. Cal. L. Rev. 1283 (1992). In it, Mahoney attacks the idea that if a woman does not leave a job or battering relationship then the harassment or violence against her either did not exist or could not have been "so bad," arguing that this idea fails to recognize that women more typically attempt to stop the attacks and preserve what is rewarding about the job or relationship (as well as to avoid the even greater problems that leaving can pose). See *id.* at 1300-04.



mestic violence and intimate femicide to public attention and, in turn, generated feminist analysis.<sup>28</sup> Current debates concerning President Clinton, Paula Jones, and Monica Lewinsky again bring issues of feminist "theory" to the fore. In short, feminist practice and theory concern issues of daily life—how women and men live, work, and relate. These real-life issues engage and galvanize public attention and then generate law reform efforts, such as the effort to educate Congress about sexual harassment in the Clarence Thomas confirmation hearings, which in turn generate more theory. And the spiral continues, as, for example, the tremendous amount of sexual harassment litigation that arose after the Hill-Thomas hearings led to the Supreme Court's series of decisions in 1998<sup>29</sup> and resulted in richer and more nuanced theoretical exploration among feminist legal scholars.<sup>30</sup>

## II. THE INTERRELATIONSHIP BETWEEN FEMINIST LEGAL THEORY AND THE LEGAL PROFESSION

Just as substantive legal doctrines, law reform, and social change have developed out of the interplay between theory and practice, feminist legal theory has also emerged from women's experience in the legal profession and has contributed, in turn, to shaping that experience. The admission of women into law schools in the late 1960s led to the proliferation of both feminist lawmaking and feminist legal theory. At the same time, women graduating from those institutions in

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28. See, e.g., Donna Meredith Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception*, 27 Golden Gate U. L. Rev. 117, 159-64 (1997) (arguing for a domestic homicide victim exception to hearsay evidence rules to allow the court to hear about the victims' fears of lethal attack); Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. Cal. L. Rev. 1463, 1512-16 (1996) (arguing that the rules of evidence that bar evidence of previous acts of domestic violence in femicide trials are gender-biased and must be changed to allow a jury to see the pattern of violence between a defendant and his victim in order to render a fair verdict); Karleen F. Murphy, Note, *A Hearsay Exception for Physical Abuse*, 27 Golden Gate U. L. Rev. 497, 522-25 (1997) (evaluating the physical abuse exception to existing hearsay rules enacted by the California legislature in response to the verdict in the criminal trial of O.J. Simpson).

29. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2279 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2269 (1998); *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2000 (1998); *Oncale v. Sundowner Offshore Serv. Inc.*, 118 S. Ct. 998, 1001 (1998).

30. See generally, e.g., Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 Cornell L. Rev. 1169 (1998) (arguing that sexual harassment should be understood as a practice that preserves male control and entrenches masculine norms in the workplace—an interference with human agency, particularly the agency of women); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445 (1997) (urging that the "reasonableness" standards for sexual harassment law should be replaced with an alternate standard of the "respectful" person); Katherine M. Franke, *Gender, Sex, Agency and Discrimination: A Reply to Professor Abrams*, 83 Cornell L. Rev. 1245 (1998) (defending the author's formulation of sexual harassment as gender-based harm); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683 (1998) (proposing a competence-centered account of hostile work environment harassment).

increasing numbers during the 1970s and 1980s had a direct interest in the structure of the legal profession and its responsiveness to their needs as lawyers as well as litigants. As a result, feminist legal theorists have taken a lively interest in the issues raised by the problems women encounter in the legal profession, and the development of various feminist theoretical perspectives has dramatically impacted law reform efforts within the profession itself. In addition, women practitioners, judges, and academics became involved in investigating and reporting on the status of women in the legal profession for a variety of groups, including the ABA Commission on Women in the Profession and both state and federal gender bias task forces. The reports that resulted from their investigations reflected a persistent sexism that has plagued women's entry into the legal profession, exposing the limits of formal equality in this context.

The mass of material that now exists on gender bias within the legal profession, on balancing career and family, and on sexism within the traditional law firm culture attests to the continuing vitality (and perhaps depressing consistency) of these themes. Reflecting upon efforts to address the problem of gender bias within the profession, feminist legal scholars and practitioners have developed profound insights into the nature of, and institutional obstacles to, gender equality. They have also begun to develop both innovative lawyering practices and theories about the legal profession, the status of women within it, and sources of change. Like the development of substantive legal doctrines, theory in this context cannot be divorced from practice and from the real-life experiences of women.

#### A. *Formal Equality as the Route into the Legal Profession*

To paraphrase Catharine MacKinnon, women lawyers cannot help but have a certain affection for formal equality theory, because it was responsible for gaining them access to the legal profession on the same terms as men.<sup>31</sup> With some exceptions, women were largely excluded from legal education for much of the nineteenth and twentieth centuries. Harvard Law School admitted its first women students only in 1950, and a few other schools excluded women until the 1960s and 1970s.<sup>32</sup> Even then, women law students faced other barriers, as admissions quotas restricted their numbers and hostility greeted their presence in the classroom.<sup>33</sup> Federal anti-discrimination laws,

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31. See Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourses on Life and Law* 32, 35 (1987) ("I have to confess a sincere affection for [formal equality theory] . . . It has gotten women some access to employment and education, the public pursuits, including academic, professional, and blue-collar work . . . ." (citations omitted)).

32. See Cynthia Fuchs Epstein, *Women in Law* 50 (1981).

33. See *id.* at 63-67; Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America: 1638 to the Present* 103-07 (1986).

grounded in notions of formal equality, were responsible for shattering outright barriers to access to legal education.<sup>34</sup> In March 1971, the Professional Women's Caucus filed a class action lawsuit against every law school in the country receiving federal funds, based in part on preliminary statistics provided by the Association of American Law Schools' Committee on Women in Legal Education.<sup>35</sup> Thereafter, the number of women studying law increased from 8.5% of the total in 1970 to 33.5% in 1980,<sup>36</sup> and has hovered between 40% and 50% since 1986.<sup>37</sup>

Upon graduation from law school, women still faced barriers to obtaining legal jobs, especially in elite law firms; until the 1970s, Wall Street firms openly refused to hire women.<sup>38</sup> Again, lawsuits based on formal equality principles provided a remedy for the outright refusal to hire women, and Title VII suits were ultimately successful in forcing law firms to hire women.<sup>39</sup> Thus, it is not surprising that formal equality theories were the first to attract allegiance among legal practitioners and academics, as they had been so necessary and were so rapidly successful in breaking down formal barriers to women's entry into the legal profession.

#### B. *Early Theoretical Reflections upon the Continuing Problems that Formal Equality Does Not Address*

Once women were admitted to law schools and law firms, they encountered problems that formal equality theory did not appear to address. Informal barriers to success in law firms proved even harder to surmount than outright denial of access had been. Hired as associates in numbers comparable to men, few women became partners or rose to positions of power within private firms, supporting the notion that some sort of "glass ceiling" prevented the promotion of women to positions at the top of the law firm hierarchy.<sup>40</sup> Women's continuing role as the primary caretakers of children (and of elderly persons and households in general) appeared to be incompatible with the structure of high-powered legal work, with its requirements for very long hours worked away from home.

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34. See Becker et al., *supra* note 3, at 825-26; Herma Hill Kay & Martha S. West, *Sex-Based Discrimination: Text, Cases and Materials* 1121-23 (4th ed. 1996).

35. See Judith Hole & Ellen Levine, *Rebirth of Feminism* 103 (1971).

36. See Epstein, *supra* note 32, at 53.

37. See Commission on Women in the Profession, American Bar Ass'n, *Unfinished Business: Overcoming the Sisyphus Factor* 7 (1995) [hereinafter ABA 1995 Report].

38. See Epstein, *supra* note 32, at 83-95; Morello, *supra* note 33, at 194-217.

39. See Epstein, *supra* note 32, at 184-88; Morello, *supra* note 33, at 210-15.

40. See Commission on Women in the Profession, American Bar Ass'n, *Report to the House of Delegates* 5 (1988) [hereinafter ABA 1988 Report]; Mona Harrington, *Women Lawyers: Rewriting the Rules* 37-38 (1994).

Women entering legal academia faced similar problems. By 1986, women represented 40% of law students but only about 20% of full-time law faculty, and many women law teachers were employed as clinicians or legal writing instructors—lower-paying and lower-status positions within the law school hierarchy.<sup>41</sup> Studies also showed that women law professors obtained tenure at a lower rate than men.<sup>42</sup> Women of color still fare worst in the law teaching market. They enter teaching at lower ranks than minority men of similar qualifications, obtain jobs at significantly less prestigious schools, and are more likely to teach courses considered low in status—differences that persist when controlling for a variety of indicia of merit, such as academic credentials and clerkships.<sup>43</sup>

Whether as a result of their own failure to thrive in academia, their own previous experiences in practice, or reports returning from female students they had taught, feminist law professors began to reflect upon the reasons that women continued to face barriers to full participation in the legal profession. The theories they advanced in this context began to develop a sustained critique of formal equality as the route to improving women's status within the profession.

One of the earliest and most influential articles was written by Carrie Menkel-Meadow. In *Portia in a Different Voice*,<sup>44</sup> Menkel-Meadow applied Carol Gilligan's "different voice" (or cultural feminist) theory to women's participation in the legal profession. Beginning from Gilligan's conclusion that women tend to employ different modes of moral reasoning than men, and specifically an "ethic of care" rather than a more abstract rights-based approach, Menkel-Meadow suggested that women would also prefer a substantially different lawyering style than men. This would explain women's discomfort at the adversarial, win/lose rules of engagement in both law school and litigation. Menkel-Meadow thus suggested that women lawyers would reject adversarial modes of practice and seek modes of lawyering that take the interests of all parties into account and endeavor to preserve the relationships among them—alternative dispute resolution, for example.<sup>45</sup> She argued that women lawyers would also organize their work relationships in a less competitive, more collabo-

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41. See Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 Temp. L. Rev. 799, 803 (1988).

42. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. Pa. L. Rev. 537, 550 (1988).

43. See Deborah J. Merritt et al., *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 Wis. L. Rev. 395, 405-06.

44. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; see Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 Va. J. Soc. Pol'y & L. 75 (1994).

45. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 44, at 50-55.

rative, and egalitarian manner and would structure the workplace to accommodate the demands of private as well as public life.<sup>46</sup>

Menkel-Meadow's early cultural feminist analysis of the legal profession, while speculative, was suggestive of further research. For example, Rand Jack and Dana Crowley Jack used this approach in their empirical study of thirty-six lawyers, concluding that gender was associated with different moral orientations and responses to ethical dilemmas, but only when the legal norm or professional standard was unclear.<sup>47</sup> If so, this does little to alleviate the discomfort women lawyers who are care-oriented may feel in an adversarial legal setting. Based upon their interviews with individual women lawyers, the Jacks described three different ways they handled this conflict: (1) some simply emulated the "male" rights-oriented model and denied their more "relational" selves, subordinating personal concerns to the demands of their professional roles; (2) others "split the self" into a detached lawyer at work and the caring self at home; and (3) still others attempted to reshape their role as lawyers to conform to their personal morality.<sup>48</sup>

Suzanna Sherry applied a cultural feminist approach to the judiciary, attempting to demonstrate through her study of the opinions of Justice Sandra Day O'Connor that women judges display greater concern for context and community and less for abstract rules than do male judges.<sup>49</sup> Her conclusions have been called into question by later studies<sup>50</sup> and challenged by Justice O'Connor herself.<sup>51</sup> Detached from an attempt to identify specific theoretical or moral approaches with particular individuals, the cultural relativist approach to judging as a legal enterprise may provide important insights. In a recent book, for example, Robin West describes an ethic of care rooted in a preeminently female experience of connection, emotion, relatedness, and empathy, which, she argues, provides a distinct moral stance that is interdependent with and necessary to an ethic of justice.<sup>52</sup> Analyzing judicial opinions in a number of recent cases, West shows that

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46. *See id.* at 56-57.

47. *See* Rand Jack & Dana Crowley Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 54-55, 75 (1989).

48. *See id.* at 130-55.

49. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 592-613 (1986).

50. *See, e.g.,* Sue Davis, *The Voice of Sandra Day O'Connor*, 77 *Judicature* 134, 138-39 (1993) (concluding that Justice O'Connor's record "do[es] very little to support the assertion that [her] decision making is distinct by virtue of her gender"). A recent article compared the decisions of Justices O'Connor and Ginsburg and concluded that the differences, driven primarily by ideology, between them were more significant than the similarities. *See* Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 Ind. L.J. 891, 900-05 (1995).

51. *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1558 (1991).

52. *See* Robin West, *Caring for Justice* 22-93 (1997).

a judge who fails on either branch—justice or care—fails to render a genuinely just decision.<sup>53</sup> Thus, the insights of cultural relativism, drawn from the experiences of women's lives, are "fed back" into the real world of legal practice as more universal guides for judging.

Other feminist legal scholars have grounded themselves in dominance feminism for their analysis of women's continuing problems in the legal profession. In her attack upon formal equality, Catharine MacKinnon had challenged the origins and structural significance of the "norms" that define "normality" in the workplace, showing that men and their typical lives were taken as the standard against which the performance of all persons were to be measured.<sup>54</sup> Following this approach, other feminist legal scholars have openly attacked the rules under which success in the legal arena is defined and which serve to perpetuate men's dominance in the profession. In an important early essay, Leslie Bender pursued this analysis in the context of women's efforts at success in law firms as they are currently structured.<sup>55</sup> She attacked both formal equality's assimilationist premise that women should be required to take on the characteristics and lifestyles currently associated with men in order to succeed as lawyers and the cultural feminist argument that women should be accorded "special" treatment, like the "mommy-track,"<sup>56</sup> to compensate for their differences from men. Instead, Bender argued that the legal profession was "constructed by men to reinforce and reward their gendered male characteristics," and must be reconstructed on the basis of gender equality, eliminating the disadvantages women face in their continuing roles as interpersonal caregivers.<sup>57</sup> In short, feminist theoretical analysis of the legal profession resulted in calls to end discrimination against women lawyers by changing in profound ways how law is practiced.

C. *Attempts by Women Lawyers and Academics to Attack the Problem of Gender Bias in the Profession: Task Forces and Commissions*

In the 1980s and 1990s, a new form of literature began to emerge—reports from task forces and commissions established by women practitioners under the aegis of state supreme courts or bar associations.<sup>58</sup>

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53. See *id.* at 50-61.

54. See MacKinnon, *supra* note 31, at 34, 36, 43 (1987).

55. Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 Fordham L. Rev. 941 (1989).

56. The term "mommy-track" is typically used to describe more flexible, often part-time, working arrangements established for women with small children. See *id.* at 943.

57. *Id.* at 949.

58. The first reports were published in the early 1980s by task forces established by the New Jersey and New York supreme courts, at the instigation of women judges and practitioners. See *The First Year Report of the New Jersey Supreme Court Task*

The gender bias task force movement provides the most striking example of this development, which compiled and described the experiences of women in the legal system both as lawyers and litigants. The material assembled by the task forces provided data about the problems women lawyers continued to experience in the profession, and some included suggestions for change. In addition, publication of the reports was official recognition that discrimination against women in the legal profession continued to exist and thus legitimized the claims that had been emerging from the academy.

The task forces undertaking these independent investigations typically consisted of a mix of judges, practitioners, and academics; their methods of research included surveys, public hearings, and round-tables. Among other topics, each task force undertook an investigation of gender bias in the courtroom. The ABA Commission on Women in the Profession extended the investigation to discrimination against women in law firms and other settings, held public hearings, and published reports in 1988 and 1995.<sup>59</sup> Women law professors took part in all of these commissions and task forces, often assisting in research design and drafting the reports.<sup>60</sup>

The findings presented in these reports are astonishingly similar, lending persuasion from their sheer cumulative effect. The state court task force reports describe continuing discrimination against women

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*Force on Women in the Courts—June 1984*, 9 Women's Rts. L. Rep. 129 (1986); *Report of the New York Task Force on Women in the Courts* (1986), 15 Fordham Urb. L.J. 1 (1986-1987). By now, a total of 35 states and five federal judicial circuits have issued reports as well. See Gender Bias Topic Bibliography (1998) (Info. Serv., Nat'l Ctr. for State Courts, P.O. Box 8798, Williamsburg, VA 23187-8798).

59. ABA 1988 Report, *supra* note 40; ABA 1995 Report, *supra* note 37. The ABA Commission also published a report on women in legal education in 1996. See Commission on Women in the Profession, American Bar Ass'n, *Elusive Equality: The Experiences of Women in Legal Education* (1996). These are only a few of the reports issued by groups of women practitioners in the last decade. See Cynthia Fuchs Epstein et al., Report, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 Fordham L. Rev. 291 (1995); Section of Business Law, American Bar Ass'n, *Where Have All the Women Gone? The Retention and Promotion of Female Lawyers* (1996). Women law students and law placement personnel undertook somewhat similar studies. See, e.g., Harvard Women's Law Ass'n, *Presumed Equal: What America's Top Women Lawyers Really Think About their Firms* (1995); Marilyn Tucker et al., *Whatever Happened to the Class of 1983?*, 78 Geo. L.J. 153 (1989).

60. For example, Cynthia Grant Bowman served as Reporter for the Illinois Task Force, Karen Czapanskiy for the Maryland Committee on Gender Bias, and Suellen Scarnecchia for the Michigan Task Force; and Judith Resnik participated in the Gender Bias Task Force for the Ninth Circuit. Law professors also contributed a number of longitudinal studies of their graduates to the literature. See, e.g., David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 L. & Soc. Inquiry 251 (1989) (studying University of Michigan Law School graduates' gender differences in balancing work and family); Lee E. Teitelbaum et al., *Gender, Legal Education, and Legal Careers*, 41 J. Legal Educ. 443 (1991) (reporting on the career choices of male and female University of New Mexico Law School graduates).

lawyers in the courtroom by male attorneys and judges—for example, inappropriate and derogatory treatment, assumptions that women are less credible than men, and a variety of forms of sexual harassment. In addition, the findings demonstrate how women's and men's perceptions of discrimination differ (in effect, women see it and men don't notice).<sup>61</sup> Although the task force reports were largely essentialist with regard to their conclusions about the experiences of women, some included brief references to the effect, for example, that the experiences of African American women were even worse.<sup>62</sup> Most of the state task forces deliberately chose to set aside questions of race or other discrimination in the legal profession for separate study, leaving the experiences of women of color (or of other marginalized groups) to fall between the cracks.<sup>63</sup>

Bar association studies pointed repeatedly to job segregation, pay differentials, glass ceilings, sexual harassment, and overwhelming work/family conflicts encountered by women lawyers.<sup>64</sup> The 1988 ABA Report described testimony by women in law firms to the effect that they lacked mentors, were excluded from socialization with clients, were not assigned to "plum" cases or only given minor roles on them, and were required to overcome a presumption of incompetence.<sup>65</sup> Moreover, the Glass Ceiling Report published by the New York City Bar Association in 1995 indicated that things might be getting worse rather than better: whereas 15.25% of female hires became partners between 1973 and 1981, only 5% of post-1981 hires did.<sup>66</sup>

Some have argued that the work of the various task forces and commissions constituted an exercise in feminist theory—essentially, cultural feminism—in that they listened to women's voices and focused

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61. For descriptions of the reports of the state task forces, see Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 Ind. L.J. 941 (1991); Judith Resnik, *Asking about Gender in Courts*, 21 Signs: J. of Women in Culture and Soc'y 952 (1996); Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. Cal. Rev. L. & Women's Stud. 1 (1996).

62. See, e.g., Illinois Task Force on Gender Bias in the Courts, *The 1990 Report of the Illinois Task Force on Gender Bias in the Courts* 221 (1990) (reporting instances of patronizing, demeaning, and dismissive conduct by male judges toward African-American female attorneys). California, Michigan, and Florida, as well as the federal task forces for the Ninth and D.C. Circuits, have made the experiences of women of color a more direct subject of study. See Resnik, *supra* note 61, at 974.

63. See *id.* at 973-77. Indeed, a number of manuals for both gender bias as well as race and ethnic bias task forces counseled separate treatment, for fear of distracting attention paid from one to the other. See *id.* at 975.

64. See, e.g., Gellis, *supra* note 61, at 944-59 (recounting dissimilarities between men and women lawyers with respect to financial rewards, opportunities for advancement, firm dynamics, discrimination, and gender issues).

65. See ABA 1988 Report, *supra* note 40, at 11-12; see also ABA 1995 Report, *supra* note 37, at 10.

66. See Epstein et al., *supra* note 59, at 358-59.



upon women's experiences as different from men's.<sup>67</sup> The theoretical grounding of the various studies carried out by the bench and the bar, however, was formal equality; this was perhaps inevitable, given the composition of the groups that authored them, which included powerful "insiders."<sup>68</sup> Thus, discrimination against women was regarded primarily as an aberration perpetrated against individuals, the continuation of outdated stereotypes, and an irrationality rather than a structural problem requiring radical change in the profession.<sup>69</sup> As a result of this theoretical grounding, recommendations for change tended to be incremental, partial, and aimed at a particular manifestation of the problem. As a remedy for in-court discrimination, for example, task forces recommended judicial education and better control by judges of their courtrooms.<sup>70</sup> To remedy problems faced by women in law firms, recommendations included part-time work and flexible schedules.<sup>71</sup> A good deal of self-help literature appeared as well, containing, for example, advice about "rainmaking" by women.<sup>72</sup>

At the same time, however, practitioners for whom these incremental changes had not worked told their stories in the legal press. Lawyers who had worked part-time or flexible hours, for instance, described how "part-time" was interpreted as forty hours a week and resulted in guilt on their own part and resentment by others, loss of benefits and desirable work assignments, and either delay or complete derailment from the partnership track.<sup>73</sup> In short, if the theory behind the task force recommendations was formal equality, the real-life experience of women lawyers was proving its limits.

#### D. Academic Theory Confronts the Data from Practice

The studies and anecdotal evidence accumulated by practitioners did accomplish a number of things that were essential to the further development of feminist theorizing about the legal profession. Similar to the consciousness-raising groups of the 1960s, the reports of multiple task forces and commissions allowed women lawyers to begin to

67. See Resnik, *supra* note 61, at 962 (describing unpublished presentation by Ann Shalleck).

68. *Id.* at 958-59.

69. As Judith Resnik observes, the "task forces themselves demonstrate the success of liberal theory in constructing an ideology of fairness that the documentation of systemic unfairness itself does not undo." *Id.* at 978-79.

70. See Swent, *supra* note 61, at 70-75.

71. See, e.g., ABA 1988 Report, *supra* note 40, at 15-16 (noting that a balance between family and work enhances productivity); ABA 1995 Report, *supra* note 37, at 17-19, 25, 27 (discussing various policies law firms have implemented to enhance women's position in the workplace).

72. See, e.g., Anne S. Gallagher, *Widening The Net*, A.B.A. J., Feb. 1995, at 60, 60 (discussing, for example, the rise in women's networking groups as a means of improving business skills); Stephanie F. Cahill, *The Rain Women*, Cal. L. Bus., Oct. 7, 1996, at 16 (advising women on improving business savvy).

73. See Susan Vogel, *The Perils of Part Time*, Cal. Law., Apr. 1996, at 37, 37-38.

see their own experiences and perceived failures not as personal or private issues to be worked out on an individual basis (which was clearly not working) or as personal failures (or anomalies, as law firms typically explain the attrition of previous women lawyers to newly recruited female associates). Moreover, the sheer weight of the evidence impressed the task force and commission members and forced them to begin to reformulate the problems confronted as not just "women's issues," but instead as issues for men, the profession, and society as a whole.

Additionally, the task force and commission reports and other empirical studies supplied important data to scholars, which both allowed and invited the application of a more theoretical approach. Feminist scholars within the legal academy were quick to make use of this data, either to test out or to formulate their own theories about sex discrimination. A large literature developed, from which just a few examples will be presented here, in order to show how theoretical examination from a feminist perspective contributes to analysis and reform of the legal profession.

Elizabeth Chambliss brings the social science literature of large-scale organizations to bear upon the problems of integrating women into the structure of the large law firm.<sup>74</sup> She examines the impact of a variety of organizational factors, such as size, bureaucratization, promotion structure, and practice characteristics upon the integration of women in ninety-seven elite firms.<sup>75</sup> A fact of central importance, she notes, is the highly subjective nature of evaluations toward partnership, by which law firms in essence "construct" their own labor supply by determining what sorts of characteristics to reward at both the associate and partner level.<sup>76</sup> Chambliss concludes that the factors having the most significant effect upon the integration of women are the length of time to partnership and the degree of bureaucratization of the firm, which she surmises may formalize previously informal patterns of occupational segregation.<sup>77</sup>

These are interesting observations, based upon hard empirical data that confirm the problems women have had succeeding in the structure of large law firms. But what follows from this analysis? Should all law firms adopt longer partnership tracks? How is this to happen? Who or what will bring about the desired changes? Individual law

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74. See Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 Am. U. L. Rev. 669 (1997) (discussing race as well as gender integration).

75. See *id.* at 673-78.

76. See *id.* at 692-93; see also Commission on Women in the Profession, American Bar Ass'n, *Fair Measure: Toward Effective Attorney Evaluations* 21-24 (1997) (recommending a process for "gender fair and effective evaluation[s]," including valuing multiple styles of work, structuring evaluation instruments and interviews so both operate more fairly, and including women in all phases and aspects of the evaluation process).

77. See Chambliss, *supra* note 74, at 728-30.

firms? Male managing partners? Bar associations? The market? In short, the organizational analysis deployed by Chambliss bumps up against the need for thoroughgoing structural change in the profession and the absence of powerful groups with the will to accomplish this change. Chambliss acknowledges that there is likely to be resistance to such change, given the almost universal professional ideology (at least in large law firms) that treats family responsibilities as suspect.<sup>78</sup>

Addressing the pros and cons of the "mommy-track" within law firms, Rebecca Korzec brings another theoretical perspective to bear on this problem—feminist literature about motherhood and the sexual division of domestic labor.<sup>79</sup> Korzec points out the substantial benefits that men as a group gain from the fact that women perform most of the caregiving labor in our society, concluding that women who follow a "mommy-track" basically subsidize their spouses' careers while forestalling the transformative change that is necessary both at home and in the workplace to enable women to succeed in law firms.<sup>80</sup> Her only substantive recommendations for change, however, are to attack excessive hourly billing and suggest the adoption of gender-neutral part-time work policies and alternate billing methods, such as fixed fee and value billing.<sup>81</sup> Again, one wonders who will provide the impetus for these major changes in the operation of the legal profession, a question that looms even larger given Korzec's description of the substantial benefits men derive from the current reward structure and sexual division of labor. Even if accomplished, moreover, there is reason to question whether the adoption by firms of the new policies suggested will prove adequate to overcome the substantial obstacles presented by the societal division of labor. Experience in other countries, for example, shows that "gender-neutral" parenting leave is taken almost exclusively by women.<sup>82</sup> In addition, competitive pressures suggest that law firms are unlikely to change their ways of doing business on an individual or voluntary basis.

In analyzing the "feminization of the legal profession," Carrie Menkel-Meadow brings to bear not only the tools of feminist analysis but also substantial cross-historical, cross-cultural, and cross-disciplinary (law and medicine) research on the profession.<sup>83</sup> She concludes

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78. See *id.* at 741.

79. See Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 *Hastings Women's L.J.* 117 (1997).

80. See *id.* at 124-27.

81. See *id.* at 136-37.

82. See Jennifer Schirmer, *Maternity Leave Policies: An International Survey: Sweden*, 11 *Harv. Women's L.J.* 185, 186 (1988) (reporting that very few men in Sweden took advantage of a gender-neutral and very generous parental leave policy).

83. See Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 *L. & Soc. Inquiry* 289 (1989) [hereinafter Menkel-Meadow, *Exploring a Research Agenda*]; see also Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 *Osgoode Hall L.J.* 897 (1986).

that for change to occur, it is necessary to explode the dominant paradigms not only of the legal profession but also of research about it. It is a mistake, she believes, to concentrate research and writing on large law firms or to focus on the "mommy-track" and other work/family issues.<sup>84</sup> To do so accepts and thereby reinforces the dominant (male) notions of success within the legal profession, the male paradigm of professionalism as individualist and hierarchical, requiring both professional "distance" and total commitment to work, and traditional notions of the family and child-rearing.<sup>85</sup> Preliminary research on career satisfaction seems to show that women define success "horizontally" rather than "vertically," finding fulfillment not from traditional monetary rewards and status or prestige, but instead from work that allows variety, balance, and larger meaning in their lives.<sup>86</sup> Rather than studying sex segregation in large law firms and work/family issues, therefore, Menkel-Meadow suggests that the more important questions for research concern the nature and content of legal work—how it is "defined, structured, and elaborated to reinforce and encode particular conceptions of how that work should be conducted."<sup>87</sup> Moreover, she argues that innovation within the profession is unlikely to occur within large law firms, the traditional centers of power; instead researchers should study alternative work settings—women-only firms and public interest and government jobs where women tend to cluster—to see whether the practice of law and legal culture are different in more heavily female institutions.<sup>88</sup> In short, Menkel-Meadow holds out little hope for the ultimate success of incremental change within law firms as they are currently structured, calling instead for major changes within the legal profession—changes that will likely be explored first within alternative practice settings and for which the political will is likely to come from "outsiders."

E. *Attempts to Develop a Theory of Feminist Lawyering Through Practice*

As Menkel-Meadow had predicted, attempts to confront the limits of formal equality have developed on the margins of the profession, as women practitioners and academics have attempted to develop a vision of feminist lawyering that would transform the practice of law. We discuss two aspects of this development: the establishment of women's law firms, and the theoretical work on feminist lawyering by women teaching in law school clinics.

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84. See Menkel-Meadow, *Exploring a Research Agenda*, *supra* note 83, at 307-08.

85. See *id.* at 307-10.

86. See *id.* at 307 (citing David Chambers's findings).

87. *Id.* at 304.

88. See *id.* at 317-18.

## 1. Women's Law Firms

In a book originally published in 1981, Cynthia Fuchs Epstein described the feminist law firms that were established in the 1970s.<sup>89</sup> A number of women's firms were established in New York City, intending to serve women, democratize attorney-client relations, and establish egalitarian working communities.<sup>90</sup> Before the decade had ended, however, these firms had all closed their doors, despite considerable success in their legal work. The practices foundered for a variety of reasons, according to Epstein, many of them economic. The feminist lawyers were ambivalent about making money, took many clients who couldn't pay fees, and had trouble attracting fee-paying business other than family law cases.<sup>91</sup> The egalitarian structure of their law offices led to stress and resentment among attorneys and staff alike; moreover, women lawyers establishing the firms were all young, creating a dilemma when they began to have children and wanted to work part-time all at once.<sup>92</sup> At the same time, the women's firms were exploring open, new, and non-authoritarian ways of structuring the professional relationship. However, the firms' largely female clients tended not only to expect more of their feminist lawyers, but also to have unreasonable expectations (for example, that no fees would be charged for lengthy "nurturing" conversations with their attorneys), creating strains upon the attorney-client relationship.<sup>93</sup> By 1978, the feminist firms in New York had dissolved.

There appears to be a renaissance of women's (or majority women's) law firms in the 1990s.<sup>94</sup> Like their predecessors, the women pursuing this option typically form their own firms out of a desire to pursue important social justice litigation (especially on matters of significance to women), to implement a vision of legal practice that is egalitarian, collaborative, and client-centered, and to obtain more flexibility in combining work and personal life than is available in large law firms.<sup>95</sup> To accomplish this, some of these firms either split all profits equally or explicitly detach rewards from billable hours, giving credit for administrative work, mentoring, and other important tasks within the firm.<sup>96</sup> Women lawyers who work in these firms report a collegial attitude and comfortable environment as well as crea-

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89. See Cynthia Fuchs Epstein, *Women in Law* 139-61 (2d ed. 1993).

90. See *id.* at 140.

91. See *id.* at 145-50.

92. See *id.* at 150-52.

93. See *id.* at 152-56.

94. See Deborah Graham, *Law's New Entrepreneurs*, A.B.A. J., Feb. 1995, at 54; Halle Jordan, *Sacramento's Largest All-Women Firm Turns 10*, Cal. L. Bus., July 1, 1991, at 5; Abdon M. Pallasch, *Women-Owned Firms Slow to Form But Many Predict a Future Increase*, Chi. Law., May 1995, at 4; Robert Safian, *Breaking Barriers in Boston*, Am. Law., May 1990, at 50.

95. See Graham, *supra* note 94, at 55.

96. See *id.* at 56.

tive lawyering that often seeks less adversarial modes of conflict resolution.<sup>97</sup>

Unlike the firms of the 1970s, however, the newer women's firms appear to be prospering. This may have something to do with the age of the participants in many of them: they tend to be older, past the age of caring for very young children, and possess experience and connections from practice in firms or government service.<sup>98</sup> Some earn fees from types of cases that were not possible in the 1970s, such as sexual harassment litigation; others have developed creative new feminist causes of action out of claims learned from the lawyers' experience in corporate legal practice (for example, the successful RICO claim against abortion clinic protesters).<sup>99</sup> Others have attracted business as a result of the new partners' previous prominence in government service.<sup>100</sup> Government agencies and clients with diversity commitments (or outright set-aside programs for contractors) have also provided opportunities for women's firms.<sup>101</sup> While these newer all-women firms represent only a small portion of the legal profession, they provide important sources of innovation and potentially of more general social change.

## 2. Feminist Legal Theory and Legal Clinics

A second source of innovation and of theoretical reflection on innovative lawyering has been law school legal clinics, many of them staffed by attorneys who left large law firms or other types of high-volume practice for political or lifestyle reasons. As the clinical movement grew, clinicians became well organized, both through the Clinical Section of the Association of American Law Schools and a separate Clinical Legal Education Association. Today, clinicians hold multiple conferences each year. Prompted by pressure from their employers to produce scholarship as well as by a desire to share the pedagogy emerging in clinical settings, clinical conferences began to hold sessions on clinical scholarship and even founded a separate journal.<sup>102</sup> By now, clinical scholarship has produced a large body of literature.<sup>103</sup> Feminist legal theory has played an important role in this

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97. *See id.*

98. *See* Jordan, *supra* note 94, at 5, 7; Pallasch, *supra* note 94.

99. *See, e.g.,* Jordan, *supra* note 94, at 5 (describing Sacramento firm's success in sex discrimination and sexual harassment cases); Pallasch, *supra* note 94 (describing innovative use of RICO by majority women-owned firm in Chicago).

100. *See* Safian, *supra* note 94 (describing a Boston firm formed by ex-U.S. Attorneys).

101. *See* Graham, *supra* note 94, at 56; Pallasch, *supra* note 94.

102. *The Clinical Law Review: A Journal of Lawyering and Legal Education* is co-sponsored by the Clinical Legal Education Association, the Association of American Law Schools, and New York University School of Law.

103. *See generally, e.g.,* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107 (1991) (discussing the notion of poverty law advocacy as a medium of story telling); Clark D. Cunningham, *A Tale*

scholarship throughout the 1990s, undoubtedly because so many clinicians are women.<sup>104</sup> Indeed, a sizable group of feminist legal scholars has emerged from the ranks of clinicians or former clinicians—including both authors of this article.

Some of the earliest scholarship about feminist lawyering focused on whether to use feminist arguments and methods in the practice of litigation, as was done, for example, in the "Voices Brief" filed in the *Webster* abortion rights case.<sup>105</sup> Other practitioner-academics argued that the urgency of women's legal needs instead requires lawyers who are trained and willing to fight with the weapons used in a legal system currently organized around adversarial, win/lose principles.<sup>106</sup> A similar controversy has concerned whether women attorneys should prefer mediation and other modes of alternative dispute resolution that embody an ethic of care, as suggested in Carrie Menkel-Meadow's early work,<sup>107</sup> in light of evidence that women and other disempowered groups may be disadvantaged by informal processes.<sup>108</sup> Other writers raise feminist concerns about the selection of clients.<sup>109</sup> Are there particular types of cases that feminist attorneys should refuse to take? Is it ethical (although a deviation from current professional standards) only to represent certain types of clients—or only

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of *Two Clients: Thinking About Law As Language*, 87 Mich. L. Rev. 2459 (1989) (exploring the concept of representation through language, experience, knowledge, and personal narrative); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 Colum. L. Rev. 1990 (1995) (re-evaluating the author's own lawyering through the "filter" of motherhood).

104. As of July 1998, there were 837 male clinicians and 616 female. See Electronic mail from David Chavkin, Chair of the Data Collection and Dissemination Committees of the Association of American Law Schools and the Clinical Legal Education Association, to Daniel Goldwin, Research Assistant for Cynthia Grant Bowman (July 23, 1998) (on file with Cynthia Grant Bowman). Thus, women make up about 42% of clinical professors. By contrast, according to 1998 ABA statistics, women make up only 27.6% of all full-time (tenure, tenure track, or long-term contract clinical) law professors. See Official ABA Guide to Approved Law Schools 450 (Rick L. Morgan & Kurt Snyder eds., 1998).

105. See Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in Webster v. Reproductive Health Services*, 13 Harv. Women's L.J. 137, 170-72 (1990). The Voices Brief filed in *Webster v. Reproductive Health Services*, a major abortion rights case before the Supreme Court, relied primarily upon first-hand accounts of women's experiences with abortion decisions before and after *Roe v. Wade*. For excerpts from the Voices Brief, see Becker et al., *supra* note 3, at 391-94.

106. See Sarah E. Burns, *Notes from the Field: A Reply to Professor Colker*, 13 Harv. Women's L.J. 189, 193 (1990) (arguing that feminist litigation must instead aim at "transforming established social, economic, political and legal power relations that work to the detriment of women," by whatever means necessary (citation omitted)).

107. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 44.

108. See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1600-01 (1991) (noting potential problems mediation poses to women).

109. See, e.g., Joan Mahoney, *Using Gender as a Basis of Client Selection: A Feminist Perspective*, 20 W. New Eng. L. Rev. 79, 85-90 (1998) (analyzing under different schools of feminist legal theory a Massachusetts case in which a female attorney refused to represent a male divorce client).

one gender? Still other articles attempt much more thoroughgoing syntheses of the insights of feminist and clinical legal scholarship.<sup>110</sup>

The implications of feminist lawyering for the professional relationship has played a central role in this discussion. Clinician Minna Kotkin, for example, suggests that the values of care and connection associated with women need not drive feminist lawyers out of litigation but instead can be incorporated, through an "advocacy of protection," into the professional relationship—one in which the attorney is not distanced from the client and her goals, but acts empathetically and assertively on her behalf.<sup>111</sup> Otherwise, Kotkin points out, care-oriented attorneys might all leave the adversarial system and thereby remove from it important sources of innovation.<sup>112</sup>

Perhaps the best and most helpful feminist scholarship to emerge from clinical practice, however, is the analysis of actual clinical experience and insights gleaned from feminist legal scholarship. A good example of this type of scholarship is Kimberly O'Leary's 1992 piece, *Creating Partnership: Using Feminist Techniques to Enhance the Attorney-Client Relationship*.<sup>113</sup> In this work, O'Leary explicates three techniques that have their origins in feminist scholarship: (1) asking the "excluded person question" (that is, taking into account the experiences and values of women and other persons who are "outsiders"); (2) consciousness raising; and (3) engaging in feminist practical reasoning (with more sensitivity to context).<sup>114</sup> She then applies them to actual cases that she and her students have confronted in a law school clinic. For each, she describes a clinic case in which the discovery of facts or development of a successful legal theory depended upon use of these techniques. O'Leary also criticizes her own performance in a case that was ultimately unsuccessful from the point of view of the client (although litigated in an entirely ethical, professional, and technically correct manner from the point of view of traditional legal rules), demonstrating how the use of feminist techniques would not only have led to more satisfactory results but would also have constituted better lawyering. For example, had O'Leary understood the importance of the Native American and migrant farm cultures in which one client lived, the two might have formed a genuine partnership around shared values and goals.<sup>115</sup> Such a partnership would also

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110. See generally, e.g., Goldfarb, *supra* note 2 (exploring methodological relationship between clinical legal education and feminist jurisprudence).

111. Minna J. Kotkin, *Professionalism, Gender and the Public Interest: The Advocacy of Protection*, 8 St. Thomas L. Rev. 157, 169-73 (1995).

112. See *id.* at 171-72.

113. 16 Legal Stud. F. 207 (1992).

114. *Id.* at 212. These techniques were described originally in Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829 (1990).

115. See O'Leary, *supra* note 113, at 207-09, 221-22. The client wanted custody or visitation with a child she had not seen for more than four years, but only succeeded in preventing the child's adoption by the father's wife and obtaining brief supervised



have enabled O'Leary to counsel her client more realistically that those goals could not ultimately be fulfilled by the legal system.<sup>116</sup>

O'Leary's article reflects an amalgam of theory and practice—starting from frustrations that arose out of practice, applying feminist theory, reflecting upon the results, and then drawing conclusions about the attorney-client relationship, the appropriate professional distance, the relevance of extrinsic facts, and what constitutes good lawyering. The clinical setting constitutes a forum in which O'Leary can both discuss and model innovative lawyering to her students. In this sense, law school clinics are perhaps the ideal setting for developing transformative innovations in the legal profession, because they encourage reflective lawyering as a pedagogical tool and provide laboratories in which to experiment with more effective lawyering. They are also a setting in which the next generation of lawyers is trained.

### CONCLUSION

As we have shown, the interrelationship between feminist legal theory and legal practice is complex and striking. The interaction appears in the very genealogy of feminist legal theory, as practitioners grappled with women's legal problems and sought new substantive legal solutions for them. In this crucible, feminist legal theory was born and developed into the variety of more nuanced theories that exist today. Similarly, an active dialogue arose among feminist practitioners and theorists about the nature of the legal profession because they were confronted with the problems women encountered in the practice of law. This dialogue led to a flowering of theory when the formal equality approach that brought down the initial barriers to entry into the profession proved inadequate to address the continuing obstacles women lawyers faced, both informal and structural. Theories of feminist lawyering developed, largely out of cultural feminist approaches, and a critique of legal practice, heavily influenced by dominance feminism's challenge to the rules and structures taken as definitional of the profession. At the same time, feminist practitioners accumulated evidence about problems, lobbied for changes, and experimented with different ways in which to structure their own practice of law. In short, the interrelationship between theory and practice has generated and enriched feminist legal theory, resulted in innovative feminist lawmaking efforts, and produced important critiques of the legal profession.

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visitation that did not prove very successful; ultimately, O'Leary withdrew as her attorney. *See id.* at 207-09.

116. *See id.*

## *Notes & Observations*